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Joanna Gomula  
*Polish Academy of Sciences*

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# THE INTERNATIONAL COURT OF JUSTICE AND ADMINISTRATIVE TRIBUNALS OF INTERNATIONAL ORGANIZATIONS

*Joanna Gomula\**

## INTRODUCTION

The caseload of the International Court of Justice (ICJ) has been significant since the Court's foundation almost fifty years ago, and has increased considerably in recent times. However, when assessing the Court's contribution to the development of international law one should look beyond its caseload of interstate disputes. Through its advisory activity, based on Article 65 of the ICJ Statute and Article 96 of the United Nations Charter, the Court has played a very important role in enhancing the significance of law not only in relations between States, but also in relations between international organizations.<sup>1</sup> Through its advisory opinions, the Court has developed and strengthened concepts governing the functioning of international organizations, sanctioned the expansion of the scope and objectives of these organizations, and confirmed their important position in international relations.

While history is probably largely responsible for the Court's role in advancing the theory of international organizations, in the past two decades a phenomenon well exceeding the Court's statutory limits has affected the Court's advisory jurisdiction. In expanding the structural boundaries of international organizations, the Court has drawn itself

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\* Senior Assistant, Polish Academy of Sciences (since 1988). Magister in Law, Warsaw University (1983); Magister in Administration, Warsaw University (1983); Doctoral Program, Institute of State and Law, Polish Academy of Sciences (since 1984); LL.M., University of Michigan Law School (1991).

1. Statute of the International Court of Justice (annexed to the Charter of the United Nations, June 26, 1945), art. 65, para. 1, 59 Stat. 1055 (entered into force Oct. 24, 1945), *reprinted in* CHARTER OF THE UNITED NATIONS, STATUTES AND RULES OF COURT AND OTHER CONSTITUTIONAL DOCUMENTS (Series D, Acts and documents concerning the organization of the court, no. 1, 2d ed. 1947):

The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

U.N. Charter Article 96 provides:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

into an activity not foreseen by the instruments governing its functioning, namely the review of decisions of administrative tribunals, which are the internal<sup>2</sup> judicial or semijudicial organs of international organizations. Provisions that allow reference to the ICJ on judgments of two administrative tribunals of international organizations<sup>3</sup> amount in fact to an appeals procedure. Needless to say, by accepting such a procedure, the Court has expanded its own powers. Interestingly, this expansion has involved the application of the implied powers doctrine<sup>4</sup> to the Court itself rather than to an international organization. To date, the ICJ has answered four requests for advisory opinions involving the expansion of the Court's power of review.<sup>5</sup>

This paper will explore the origins of the Court's unusual system of review and underscore some of its problems. Surprisingly, this issue has not been adequately expounded,<sup>6</sup> although occasionally different authors have discussed particular problems, such as the participation of individuals in proceedings before the Court.<sup>7</sup>

An overview of the nature of administrative tribunals and their position in the structure of international organizations will precede the analysis of the procedural aspects of the Court's activity as an appeals tribunal. This background is important because of the ICJ's significant contribution to the evolution of administrative tribunals. One can risk a hypothesis that the Court has become a prisoner of its own

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2. The term "internal" is used narrowly to refer to relations within an organization, and more broadly to any organ, including the ICJ, which is an "internal" organ of an international organization.

3. The two tribunals are the United Nations Administrative Tribunal (UNAT) and the Administrative Tribunal of the International Labour Organisation (ILOAT).

4. The implied powers doctrine was laid out in the Court's advisory opinion in *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11).

5. Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77 (Oct. 23); Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166 (July 12); Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325 (July 20); Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, 1987 I.C.J. 18 (May 27). The three latter opinions constitute over one-third of all advisory opinions issued by the Court in the past two decades.

6. The only detailed up-to-date account of this aspect of the Court's activity is found in Rudolf Ostrihansky, *Advisory Opinions of the International Court of Justice as Reviews of International Administrative Tribunals*, 17 POLISH Y.B. INT'L L. 101 (1988). A recently published work on this topic does not take into account the Court's opinions of the 1970s and 1980s: Woonsang Choi, *Judicial Review of International Administrative Tribunal Judgments*, in CONTEMPORARY ISSUES IN INTERNATIONAL LAW: ESSAYS IN HONOR OF LOUIS B. SOHN 347 (Thomas Buerghenthal ed., 1984).

7. See, e.g., Ian Brownlie, *The Individual Before Tribunals Exercising International Jurisdiction*, 11 INT'L & COMP. L.Q. 701 (1962); Leo Gross, *Participation of Individuals in Advisory Proceedings before the International Court of Justice: Question of Equality Between the Parties*, 52 AM. J. INT'L L. 16 (1958).

pronouncements; by supporting certain characteristics of administrative tribunals in its opinions given in the 1950s, it has prejudged its own powers with regard to these organs and has exercised these powers in the 1970s and 1980s.

Accordingly, this paper is divided into two major parts. The first deals with the nature and functions of administrative tribunals as viewed by the ICJ. The second discusses selected problems connected with the role of the Court as a reviewing body of judgments of administrative tribunals. The limited scope of this paper does not allow an insight into the merits of the Court's pronouncements. Therefore, the second part describes theoretical and procedural problems arising in the course of the Court's "appellate" activity without evaluating it.

## I. THE INTERNATIONAL COURT OF JUSTICE ON THE ESTABLISHMENT OF ADMINISTRATIVE TRIBUNALS OF INTERNATIONAL ORGANIZATIONS

### A. *Historical Overview*

Although little is known about them, international administrative tribunals have been in existence for a considerable time.<sup>8</sup> Their origins date to the early years of the League of Nations when, in 1927, the Administrative Tribunal of the League of Nations was established.<sup>9</sup> In 1932, this tribunal had a counterpart at the Institute of Agriculture, which, however, never entertained a case.

The following administrative tribunals were created after World War II: the Administrative Tribunal of the International Labour Organisation (ILOAT) (established in 1946 as successor to the League of Nations Tribunal), the United Nations Administrative Tribunal (UNAT) (1949),<sup>10</sup> the Administrative Tribunal of the Institute of Unification of Private Law (1952), the Administrative Tribunal of the Organization of American States (1971),<sup>11</sup> and the Administrative

8. However, de Vuyst claims that the tribunals are, "as are international organizations themselves," a "relatively new phenomenon." Bruno M. de Vuyst, *The Use of Discretionary Authority by International Organizations in their Relations with International Civil Servants*, 12 DEN. J. INT'L L. & POL'Y 237, 256 (1983); see also BYUNG C. KOH, *THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL* (1966); Suzanne Bastid, *Les tribunaux administratifs internationaux et leur jurisprudence*, 92 R.C.A.D.I. 343 (1957); Bruno M. de Vuyst & Linda L. Thompson, *International Administrative Tribunals: A Basic Introduction and Bibliography*, 9 INT'L J.L. LIBR. 60 (1981).

9. For an overview of its activity, see, e.g., KAHMATULLAH KHAN, *IMPLIED POWERS OF INTERNATIONAL ORGANIZATIONS* 178-83 (1970).

10. UNAT's creation was delayed due to opposition from the United States and the Soviet Union. These countries feared that the Tribunal would constitute an interference with the Secretary General's control over the Secretariat. De Vuyst, *supra* note 8, at 257.

11. On its recent activity, see David J. Padilla, *Administrative Tribunal of the Organization of American States*, 14 LAW. AM. 259 (1982).

Tribunal of the International Bank for Reconstruction and Development (1980).<sup>12</sup> The relatively small number of administrative tribunals, when compared with the number of international organizations, is balanced by the ability of other organizations to adopt the statutes of either ILOAT or UNAT.<sup>13</sup> Moreover, some organizations have developed special boards competent to resolve conflicts between their staff members and the organization. For example, in the European Community the power to resolve such disputes has been vested with the European Court of Justice, and until 1979, also was within the scope of the ICJ.<sup>14</sup>

### B. *Nature of Administrative Tribunals*

The nature of international administrative tribunals is somewhat ambiguous. In general terms, they are bodies established by international organizations to decide disputes between those organizations and their staff members. However, this does not determine whether they are judicial bodies, advisory organs, or mere subordinate committees of the main organ.<sup>15</sup> Ascertaining the nature of administrative tribunals is of crucial importance for discovering the binding force of their decisions and their relations with other organs. The ICJ was faced with this problem in its advisory opinion of 1954 concerning UNAT,<sup>16</sup> in which it laid down the foundations of the system of judicial protection of international officials. The Tribunal had rendered judgments in the cases of twenty-one former United Nations staff members discharged by the Secretary General.<sup>17</sup> It decided in favor of the staff members in ten cases concerning permanent appointments and one case concerning a temporary appointment; it then ordered reinstatement in four cases and payment of compensation in lieu of reinstatement in seven others. Since the Secretary General decided not to reinstate the four applicants, they too were awarded compensa-

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12. For a discussion of its role, see C.F. Amerasinghe, *The World Bank Administrative Tribunal*, 31 INT'L & COMP. L.Q. 748 (1982).

13. For a list of organizations having acceded to those statutes, see de Vuyst, *supra* note 8, at 257.

14. *Id.* at 256.

15. See Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 51 (July 13).

16. *Id.* at 47.

17. The staff members were U.S. citizens who had refused to answer questions before a Senate Committee. See *Structure and Organization of the United Nations*, 1953 U.N.Y.B. 3, 80-85, U.N. Sales No. 1954.1.15; Written Statement by the Secretary General, 1954 I.C.J. Pleadings (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal) 188-248 (July 13, 1954). The political background of the case is expounded in GEORGES LANGROD, *THE INTERNATIONAL CIVIL SERVICE* 214-15 (1963).

tion in later judgments, and consequently the organization's expenses exceeded the previously anticipated sum by nearly \$180,000.<sup>18</sup> Some States, the United States in particular, advanced the view that the responsibility and competence of principal organs must prevail over those of subsidiary organs, and that as a principal organ the General Assembly had the right to refuse to carry out the Tribunal's awards.<sup>19</sup> As a consequence, a request for an ICJ advisory opinion was formulated, the first part of which read as follows:

Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favor of a staff member of the United Nations whose contract of service has been terminated without his assent?<sup>20</sup>

When assessing the character of the Tribunal, the Court found it crucial to determine the intent of the founder of UNAT—in this case, the U.N. General Assembly. Following a textual examination of the Statute of the Tribunal, the ICJ found terms and expressions such as “tribunal,” “judgment,” and competence to “pass judgment upon applications” to be “evidence of the judicial nature of the Tribunal.”<sup>21</sup> This led to the conclusion that the Tribunal was “an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions.”<sup>22</sup>

The classification of administrative tribunals as judicial organs is further supported by many other of their characteristics, most of which relate to the composition of the tribunal. For example, a tribunal may not be composed of parties to a dispute, its members must be independent, and it must be a permanent body of a determined composition not subject to any modifications by the parties.<sup>23</sup> Some doubts about UNAT's classification as a judicial organ arise from the absence of a requirement that its members have specialized training or legal qualifications.<sup>24</sup> In practice, however, this “deficiency” is of no great significance, for administrative tribunals are generally composed of

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18. *Structure and Organization of the United Nations*, *supra* note 17, at 81.

19. Written Statement of the United States of America, 1954 I.C.J. Pleadings (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal) 131-35 (July 13, 1954).

20. 1954 I.C.J. at 48.

21. *Id.* at 52.

22. *Id.* at 53.

23. Ostrihansky, *supra* note 6, at 72-73; *see also* CARL A. NØRGAARD, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW* 293-97 (1962).

24. 1954 I.C.J. at 92, 93 (dissenting opinion of Judge Carneiro).

persons having those qualifications.<sup>25</sup>

It should also be underlined that administrative tribunals are international organs. Their international character is determined not only by the method of their establishment and their composition,<sup>26</sup> but primarily by the law they are bound to apply, namely, "the domestic law of international organizations, sometimes called 'infra-international law', . . . recognized in doctrine as an autonomous legal branch of public international law."<sup>27</sup> The sources of this law are found in legal instruments constituting or emanating from international organizations such as contractual documents, provisions of constituent instruments of the organizations, and staff regulations.<sup>28</sup> When rendering its award, the tribunal may also take into consideration general principles of law, as well as the principles of the Universal Declaration on Human Rights.<sup>29</sup>

The ICJ explicitly recognized the international character of administrative tribunals in its advisory opinion of 1956 dealing with ILOAT.<sup>30</sup> However, the Court acknowledged at the same time that administrative tribunals are bodies of a special character. While admitting that the Tribunal is vested only with "limited jurisdiction," the ICJ refused to apply to the Tribunal arguments based on the international legal principle of sovereignty of States. The Court held those arguments "not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization"—as opposed to a dispute between States.<sup>31</sup> It therefore seems that administrative tribunals are "special" international judicial organs, having a *sui generis* character.

### C. *Legal Bases of Administrative Tribunals*

Given that administrative tribunals are organs of a judicial character, the next question is where to find their legal basis if the constitutional act of an international organization does not anticipate their

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25. T. Meron, *Status and Independence of the International Civil Service*, 167 R.C.A.D.I. 285, 354-55 (1980).

26. Georges Langrod, *Le tribunal administratif des Nations Unies*, 67 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 71, 95 (1951).

27. De Vuyst, *supra* note 8, at 237.

28. *Id.* at 238-39.

29. Manfred Lachs, *Jurisdictional Organs (Organization and Procedure)*, in MANUEL SUR LES ORGANISATIONS INTERNATIONALES / A HANDBOOK ON INTERNATIONAL ORGANIZATIONS 146, 163 (René-Jean Dupuy ed., 1988).

30. Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77, 97 (Oct. 23).

31. *Id.*

existence. The problem would not arise if administrative tribunals were simple subsidiary organs. Usually, however, the power to create such organs is expressly provided for in the constitutional act. The authorization may take the form of a general authorization for all main organs to create such bodies, specific authorization for each of the main organs, or authorization to create subsidiary organs in a given field of activity of the organization.<sup>32</sup> However, constitutional acts do not always anticipate the structural needs of an international organization.<sup>33</sup>

It is a well-established rule that international organizations may create additional auxiliary organs necessary for carrying out their functions even absent express statutory authorization. This aspect of implied powers was first recognized doctrinally in the League of Nations period by Dionisio Anzilotti.<sup>34</sup> Since Anzilotti's time, the capacity of international organizations to create auxiliary organs has developed considerably: in practice, the functions and powers of the latter may go so far as to resemble those of a separate international organization—as is the case with United Nations Conference on Trade and Development (UNCTAD), United Nations Children's Fund (UNICEF), or United Nations Industrial Development Organization (UNIDO). As some authors note, the United Nations has followed a "pragmatic approach" in this regard; the composition, terms of reference, and methods of operation of the organs have been "adapted to the special requirements of the particular task to be undertaken."<sup>35</sup>

According to traditional concepts, the question of powers of subsidiary organs, as well as their relationship to the main organs, was subject to a simple rule: the main organ was always free to decide the new organ's scope and composition, the range of its activities, and the effects of its resolutions. Since their powers were delegated, secondary, and dependent upon the powers of the main organ, subsidiary organs could not be assigned powers broader than those of the main

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32. S. Torres Bernárdez, *Subsidiary Organs*, in MANUEL SUR LES ORGANISATIONS INTERNATIONALES / A HANDBOOK ON INTERNATIONAL ORGANIZATIONS, *supra* note 29, at 100, 111. The author notes that the U.N. Charter provides examples of all three forms of authorization.

33. *Id.* at 103.

34. Anzilotti advanced the theory that some organs should have the capacity of "auto-determination," that is, the power to determine their own method of functioning in the absence of express statutory provisions. 1 DIONISIO ANZILOTTI, *COURS DE DROIT INTERNATIONAL* 295-96 (1929). On the doctrine of implied powers, see, e.g., KHAN, *supra* note 9; BERNARD ROUYER-HAMERAY, *LES COMPÉTENCES IMPLICITES DES ORGANISATIONS INTERNATIONALES* (Bibliothèque de droit international tome 25, 1962).

35. LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENT* 104 (3d ed. 1969).



organ.<sup>36</sup>

The U.N. Charter does not explicitly provide for the General Assembly or any other organ to establish a body empowered to decide disputes between staff members and the organization. The powers to establish subsidiary organs have been vested in the General Assembly, in general terms, by Article 22 and Article 7(2).<sup>37</sup> Those provisions do not in any way determine the character of the new bodies except for stating the condition that they be "necessary" (with no further qualifications) or "necessary for the performance" of the Assembly's functions. If the traditional concept of subsidiary organs is applied, none of those provisions could qualify as a sufficient basis for the creation of a tribunal of such a nature as that determined by the ICJ with respect to UNAT. The functions exercised by UNAT are not exactly "functions embraced within the overall functions of the principal organ and closely corresponding to the legitimate activities of the principal organ."<sup>38</sup> The General Assembly is not vested with judicial functions itself and as such could not have delegated powers to resolve disputes to its subsidiary body. The doctrine of *nemo dat qui non habet* supports this argument.

The Charter of the United Nations does, however, mention staff members in several of its provisions. It imposes on them a number of obligations and responsibilities. By virtue of Article 100, they are required not to seek or receive instructions from any government or from any authority external to the organization, and to refrain from any action which may reflect on their position as international officials responsible only to the organization. Article 101(3) specifies further expectations:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

At the same time, the Secretary General and the General Assem-

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36. See, e.g., HENRY G. SCHERMERS, *INTERNATIONAL AND INSTITUTIONAL LAW* 204-05 (1980).

37. U.N. Charter Article 7(2) provides: "Such subsidiary organs as may be found necessary may be established in accordance with the present Charter." U.N. Charter Article 22 provides: "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions."

38. Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, 226 (July 12) (separate opinion of Judge Oneyama). Judge Oneyama did not consider UNAT to be a subsidiary organ within the meaning of Article 22.

bly have wide discretion with regard to staff matters.<sup>39</sup> Given the high expectations of the staff members, on the one hand, and the far-reaching discretion of the two mentioned organs, on the other hand, it is striking that the Charter provides no mechanism of control against frivolous actions of superior officers.<sup>40</sup> Koh admits that if an organization is to "function properly—that is to say, if its administration is to be flexible, realistic, and responsive, not only to organization but to situational needs,"<sup>41</sup> then wide discretionary powers are required by the administrator, but this in turn "necessitates some kind of control mechanism."<sup>42</sup>

It is surprising, then, that officials do not have access to the ICJ, the organization's judicial organ. Under Article 34(1), only States and not individuals or international organizations, may be parties before the Court, nor may officials bring cases against the organization before domestic courts. In this connection it is interesting to note that such an attempt was made with regard to the Organization of American States (OAS). Several of its officials, disappointed by the decisions of the organization's Administrative Tribunal, initiated proceedings against the OAS in U.S. courts. The United States Court of Appeals for the D.C. Circuit dismissed the action on the grounds of immunity of international organizations:

[I]nternational organizations, and particularly the Organization of American States, are creatures of treaty and by virtue of treaty stand in a different position with respect to the issue of immunity than sovereign nations. The Court is persuaded that international organizations are immune from every form of legal process except insofar as that immunity is expressly waived by treaty or expressly limited by statute. The Court is further persuaded that this Court has jurisdiction over lawsuits involving international organizations only insofar as such jurisdiction is expressly provided by statute.<sup>43</sup>

The Court also noted that "the special nature of the law governing employment in international organizations, clearly linked as it is with delicate questions of administrative policy, makes municipal tribunals totally unsuited to deal with it."<sup>44</sup>

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39. This is inferred from U.N. Charter Article 101(1), which provides: "The staff shall be appointed by the Secretary General under regulations established by the General Assembly."

40. Compare KHAN, *supra* note 9, at 170-72 and KOH, *supra* note 8, at 26-28.

41. KOH, *supra* note 8, at 24.

42. *Id.*

43. Broadbent v. Org. of Am. States, 628 F.2d 27, 29 (D.C. Cir. 1980). The only activity the Court was willing to consider not shielded by the doctrine of immunity was "commercial activity," but the Court treated the relationship of an international organization with its internal administrative staff as "noncommercial." *Id.* at 33-35.

44. *Id.* at 35 n.27 (citing MICHAEL AKEHURST, *THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS* 12 (1967)).

There are, as Koh suggests, two kinds of control mechanisms potentially available to international officials: hierarchical and judicial control.<sup>45</sup> The former has the disadvantage of making the administrator "a judge in his own case." Needless to say, this solution would be satisfactory neither to the official nor to the administrator.<sup>46</sup> Bastid points out that without tribunals, staff disputes would remain unsettled, being *sans juge*.<sup>47</sup> This would make the maintenance of highly qualified and independent staff practically impossible.<sup>48</sup> In this connection, the Circuit Court in *Broadbent v. OAS* said:

There is therefore a vacuum which needs to be filled by the organizations themselves. The creation of an independent body, empowered to make binding decisions in legal disputes between an organization and its staff, is by no means an altruistic gesture from the organization's point of view; without it, officials might suffer from a sense of injustice which would impair the smooth running of the Secretariat.<sup>49</sup>

The U.S. court was merely reiterating a concept which had been expounded a quarter of a century earlier. In its advisory opinion of 1954, the ICJ relied heavily on the concept of necessity,<sup>50</sup> and resorted to the doctrine of implied powers to justify the establishment of UNAT. As a first step, the Court noted that there is neither an express provision for the establishment of such a body, nor an indication to the contrary.<sup>51</sup> Next, it invoked its famous dictum from its 1949 opinion:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.<sup>52</sup>

The Court's conclusion was preceded by an analysis of the Charter provisions governing relations between staff members and the organization. The Court noted that the relevant provisions and staff regulations form a "complex code of law" and that "[i]t was inevitable that

45. KOH, *supra* note 8, at 24-25.

46. NØRGAARD, *supra* note 23, at 289.

47. Bastid, *supra* note 8, at 365-66.

48. Meron, *supra* note 25, at 354.

49. 628 F.2d at 35 n.27 (quoting MICHAEL AKEHURST, *THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS* 12 (1962)). In Koh's words, "[t]he rationale for administrative tribunals in general is to be found, finally, in the operational needs of a large-scale administrative organization." KOH, *supra* note 8, at 24.

50. DENYS SIMON, *L'INTERPRÉTATION JUDICIAIRE DES TRAITÉS D'ORGANISATIONS INTERNATIONALES* 201 (Publications de la Revue Générale de Droit International Public, No. 37, 1981).

51. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 56 (July 13).

52. 1954 I.C.J. at 56 (quoting *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 182 (Apr. 11)).

there would be disputes between the Organization and staff members as to their rights and duties.”<sup>53</sup> In these circumstances, the lack of judicial or arbitral remedy would be inconsistent with “the expressed aim of the Charter to promote freedom and justice for individuals.”<sup>54</sup> The power to establish an administrative tribunal was thus “essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standard of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.”<sup>55</sup>

As far as the organ capable of creating UNAT is concerned, the Court had “no room for doubt” that it had been within the powers of the General Assembly, which by virtue of Article 101(1) is responsible for adopting regulations concerning staff matters. Although the ICJ also invoked Article 7(2) and Article 22, it carefully avoided classifying UNAT as a subsidiary organ within the meaning of those provisions.<sup>56</sup> Some authors believe that the ICJ rejected Article 22 as the legal basis of UNAT.<sup>57</sup> This could be justified in view of a later statement in the Court’s opinion that “[b]y establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations.”<sup>58</sup> However, in its opinion of 1973, the ICJ indirectly confirmed that Article 22, read together with Article 101(1), was the basis of UNAT.<sup>59</sup>

There is a difference between establishing an organ in order to delegate to it the performance of the principal organ’s functions, and establishing an organ the existence and activity of which is necessary for the performance of the functions of the principal organ. In the latter case, delegation does not have to take place. In other words, if for the General Assembly and other organs to function effectively the creation of a new body is necessary, then this body’s existence will be

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53. 1954 I.C.J. at 57.

54. *Id.*

55. *Id.*

56. Classifying the Administrative Tribunal as a mere subsidiary organ would lead to Judge Hackworth’s conclusion that a subsidiary organ’s decision could not bind a principal organ possessing plenary powers under the Charter: “This would present an anomalous and unique situation in international organization—a situation that can find no sanction, express or implied, in the Charter.” *Id.* at 79 (dissenting opinion of Judge Hackworth).

57. *E.g.*, Francis A. Vallat, *The Competence of the United Nations General Assembly*, 97 R.C.A.D.I. 203, 283 (1959).

58. 1954 I.C.J. at 61.

59. Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, 172-73 (July 12).

"necessary for the proper performance of functions" of those organs, although it will exercise functions not vested in the main organ.

Another interpretation is advanced by Seyersted, who advocates "inherent powers" of international organizations. Seyersted believes that the right to establish an administrative tribunal flows from the right of international organizations to settle internal disputes with binding force, and that this right is limited only by explicit statutory provisions to the contrary.<sup>60</sup>

In Koh's view, it is manifest that Articles 22 and 101(1) "clothe the General Assembly with full authority to create any organ, be it judicial or advisory, intended to deal with personnel disputes within the United Nations."<sup>61</sup> It seems that this view merits support.

In 1973 the ICJ fully confirmed the propriety of the establishment and functioning of the UNAT system:

The adoption by the General Assembly of the Statute of the Administrative Tribunal and the jurisprudence developed by this judicial organ constitute a system of judicial safeguards which protects officials of the United Nations against wrongful action of the administration, including such exercise of discretionary powers as may have been determined by improper motives, in violation of the rights or legitimate expectations of a staff member.<sup>62</sup>

#### D. *Binding Force of Awards of Administrative Tribunals*

Identification of the parties before the Tribunal is important to evaluate the effects of its decisions. If the parties are the staff member concerned and the Secretary General or another administrative officer, then the dispute is "between component parts of an organ," and as such cannot be binding on the organization as a whole.<sup>63</sup> The ICJ took a different view: the organization itself was a party, with the Secretary General acting only as its representative. Accordingly, since the Tribunal's judgments are by virtue of its Statute final and without appeal, the organization "becomes legally bound to carry out the judgment and to pay the compensation awarded to the staff mem-

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60. Finn Seyersted, *Settlement of Internal Disputes of Intergovernmental Organizations by Internal and External Courts*, 24 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 53 (1964).

61. KOH, *supra* note 8, at 51.

62. 1973 I.C.J. at 205.

63. See *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 I.C.J. 47, 82 (July 13) (dissenting opinion of Judge Hackworth) and *id.* at 94 (dissenting opinion of Judge Carneiro). Compare *Application for Review of Judgement of the United Nations Administrative Tribunal*, 1982 I.C.J. 325, 374 (July 20) (separate opinion of Judge Ruda). In his opinion, Judge Ruda states—maybe as a simplification—that the parties to the dispute are the Secretary General and the staff member, but attributes the same consequences to the dispute as if the Organization itself were a party.

ber.”<sup>64</sup> As such, all organs of the United Nations, the General Assembly included, are bound by the Tribunal’s judgment. The Court recalled here the “well-established and generally recognized principle of law (that) a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute.”<sup>65</sup>

The binding force of an award of an administrative tribunal is affected by two principal factors: the judicial character of the organ and the fact that, as noted above, the organization is a party to the dispute. Nevertheless, the question remains whether the main organ is wholly bound by the decisions of the administrative tribunal or whether, in some circumstances, it is empowered to modify or refuse to give effect to an award of an administrative tribunal.<sup>66</sup>

In its 1954 advisory opinion the Court drew attention to the language of the Statute of UNAT and found the lack of any provision on review of its judgments to be a “deliberate decision” on the part of the General Assembly: “Like the Assembly of the League of Nations it refrained from laying down any exception to the rule conferring on the Tribunal the power to pronounce final judgments without appeal.”<sup>67</sup>

The ICJ excluded any possibility of the General Assembly acting as a review organ:

[T]he Court is of the opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ—considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them—all the more so as one party to the dispute is the United Nations Organization itself.<sup>68</sup>

The Court’s answer was not limited to the factual situation underlying the request for the advisory opinion in question; it was formulated in more general terms. The ICJ stressed that an award of UNAT could be subject to review only if an express provision to that effect existed in its Statute or in another legal instrument:

In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express

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64. 1954 I.C.J. at 53.

65. *Id.*

66. Because the decisions of administrative tribunals are also binding on particular Member States, the problem has implications beyond the problems of the internal functioning of the organization. In this connection, Seyersted points out that such decisions should be treated in the same way as judgments of domestic courts. Seyersted, *supra* note 60, at 54.

67. 1954 I.C.J. at 54-55.

68. *Id.* at 56.

provision to that effect.<sup>69</sup>

In consequence, the General Assembly could influence the finality of the Tribunal's judgments solely by modifying the latter's Statute or enacting another instrument containing the required provision, which meant that the Assembly's indirect "control" could not be retroactive. The Court did not exclude the possibility of the Tribunal "itself revising a judgment in special circumstances when new facts of decisive importance have been discovered," finding this situation to lie outside of the notion of "appeal" as used in Article 10(2) of the Statute of UNAT.

In order to strengthen its conclusion, the Court had to reject several contentions, one of which was that the establishment of a tribunal with authority to make decisions binding on the General Assembly was not "absolutely essential" for the performance of the Assembly's functions. The Court replied that "[t]he precise nature and scope of the measures by which the power of creating a tribunal was to be exercised, was a matter for determination by the General Assembly alone."<sup>70</sup> Thus, the General Assembly had wide discretion in this regard—wide enough to deprive itself as a superior authority of the power to control the judgments of UNAT.

Another contention was based on the conflict between the binding character of the Tribunal's awards and explicit provisions of the U.N. Charter concerning budgetary powers of the Assembly. According to Article 17(1) of the Charter, the General Assembly shall consider and approve the budget of the organization. It was argued that the General Assembly could not have divested itself of these powers, which allegedly would occur if it were forced to accept the Tribunal's judgments without restrictions.<sup>71</sup> However, the ICJ construed the notion of "approving" the budget narrowly, excluding "an *absolute* power to approve or disapprove the expenditure proposed to it."<sup>72</sup> Where an expenditure arises out of obligations already incurred by the organization (and UNAT awards would fall within this category), the Assembly has "no alternative but to honour these engagements."<sup>73</sup> It would certainly be contrary to the fundamental principles of justice and fair-

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69. *Id.*

70. *Id.* at 58.

71. For example, in Judge Hackworth's opinion the General Assembly could not have given "prior blanket approval to unpredictable amounts called for by awards of the Tribunal"; he found "no justification for ascribing to the Assembly such a broad curtailment of its constitutional functions." *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 I.C.J. 47, 85 (July 13) (dissenting opinion of Judge Hackworth).

72. *Id.* at 59 (emphasis added).

73. *Id.*

ness if the organization as a party to the dispute had the privilege of deciding whether to carry out its financial obligations.

It was also argued that the implied power of the General Assembly could not go so far as to enable the Tribunal to encroach on the powers of the Secretary General. In response to that contention, the Court relied on Article 101 of the U.N. Charter, inferring from it the capacity of the General Assembly to limit or control the powers of the Secretary General in staff matters "at all times."<sup>74</sup> As such, any consequent action of UNAT, having *ex ante* approval of the Assembly as expressed in the UNAT Statute, was within these limits established by the General Assembly.<sup>75</sup>

The strongest arguments, and from a doctrinal point of view the most troublesome, were connected with viewing UNAT as a subsidiary organ within the meaning of Article 22 of the Charter. Judge Hackworth's views are exemplary in this regard. Maintaining the cautious approach towards expanding the organization's powers which he had adopted in the Court's 1949 advisory opinion,<sup>76</sup> he took the stand that the doctrine of implied powers "is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers." In his opinion, the existence of an express provision—in this case Article 22—made it impossible to use this doctrine to justify the creation of a tribunal of "a supposedly different kind."<sup>77</sup> If UNAT were a subsidiary organ in the traditional sense, it could not in any way impose its decisions on the main organ.

Judge Alvarez based his arguments against the binding force of UNAT's judgments on the presumption that the General Assembly was an "all-powerful legislative organ" bound only by the U.N. Charter, or by its own resolutions, with nothing above it except "moral forces."<sup>78</sup> However, if such were the case, was it not correct to assume that this "omnipotent" organ could be powerful enough to create a body competent to give unconditionally binding decisions?<sup>79</sup>

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74. *Id.* at 60.

75. In its 1982 advisory opinion, the ICJ confirmed that the Secretary General is an organ inferior to the General Assembly in staff matters. Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 359-60 (July 20). Judge Manfred Lachs speaks even of the General Assembly's "inherent power of control over the Secretary-General." *Id.* at 429 (dissenting opinion of Judge Lachs).

76. See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 196-204 (Apr. 11) (dissenting opinion of Judge Hackworth).

77. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 I.C.J. 47, 80-81 (July 13) (dissenting opinion of Judge Hackworth).

78. *Id.* at 71-72 (dissenting opinion of Judge Alvarez).

79. When Judge Alvarez's dissenting opinion is analyzed from this point of view, one wonders why he did not join the majority opinion. ADAM BASAK, DECISIONS OF THE UNITED NA-



As has been mentioned, the Court was careful to avoid classifying UNAT as a subsidiary organ within the meaning of Article 22 of the U.N. Charter. This did not mean, however, that the General Assembly had excluded any possibility of control over the Tribunal or that the latter was in any way superior to the Assembly. The ICJ emphasized that the UNAT Statute could be changed at any time by the main organ.<sup>80</sup> It played well on the argument of broad powers of the General Assembly—perhaps as a reply to Judge Alvarez's objections—by explicitly rejecting the contention that the Assembly was “inherently incapable of creating a tribunal competent to make decisions binding on itself.”<sup>81</sup>

It should be mentioned that although judgments of UNAT are final and without appeal—even the General Assembly is powerless to review or control these judgments—the Tribunal itself cannot exercise any control over the Assembly's actions outside of the context of a dispute with a staff member. The Tribunal has an obligation to accept and apply decisions of the General Assembly adopted in conformity with Article 101 of the U.N. Charter; its power does not extend to a review of these decisions.<sup>82</sup>

Another problem worth noting is the relationship of the Tribunal to other organs of the international organization. For example, one may wonder to what extent an advisory tribunal may appraise the discretionary activity of those organs. One of the questions submitted to the ICJ, in connection with the ILOAT case, concerned the competence of the Tribunal to determine whether the power of the Director General of ILO not to review fixed-term appointments had been exercised “for the good of the service and in the interest of the Organization.”<sup>83</sup> It was argued that if ILOAT was denied this competence, the administration could always invoke the latter notion to avoid review of its actions.<sup>84</sup> The Court refused to reply to that question, leaving it open, but an analysis of the whole of the Court's opinion may give an

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TIONS ORGANS IN THE JUDGMENTS AND OPINIONS OF THE INTERNATIONAL COURT OF JUSTICE 152 (1969).

80. Two years later, the Court also relied on the provisions of the Statute of ILOAT as an expression of the principal organ's intentions when it issued its 1956 advisory opinion refusing to answer one of the questions submitted to it. The Court based its refusal precisely on the grounds that the Statute did not provide the reasons for challenging the decision of the Tribunal as formulated in that question, and stressed that the Statute could have done so. Judgment of the Administrative Tribunal of the International Labour Organisation Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77, 99 (Oct. 23).

81. 1954 I.C.J. at 61.

82. See Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 363 (July 20).

83. 1956 I.C.J. at 79.

84. Written Statements, 1956 I.C.J. Pleadings (Judgments of the Administrative Tribunal of

indication of what the hypothetical answer could have been. The Court took care to emphasize the necessity to take into account both the "wording of the texts in question" as well as "their spirit, namely, the purpose for which they were adopted."<sup>85</sup> In its 1973 opinion the ICJ explicitly stated that the system of protection created by the establishment of UNAT is also directed against "such exercise of discretionary powers as may have been determined by improper motives, in violation of the rights or legitimate expectations of a staff member."<sup>86</sup> However, in its most recent opinion the Court seems to have withdrawn from the line previously adopted. When referring to a contention that the Secretary General had ignored priorities established by Article 101(3) of the U.N. Charter, the Court underlined that "it was not for the Tribunal, nor indeed for the Court, to substitute its own appreciation of the problem for that of the Secretary General."<sup>87</sup> It would seem, however, that the proper functioning of the whole system requires that an administrative tribunal have full freedom to appraise the criteria on which a decision of an administrative officer is based. This requirement appears to be a prerequisite for ensuring that such decisions comply with the organization's statute and staff regulations.

#### *E. Committee on Applications for Review*

The ICJ's advisory opinion of 1954 had significant consequences, both in theory and practice. The opinion confirmed the power of international organizations to regulate the internal sphere of their functioning and supported the development of the concept of internal law of international organizations.<sup>88</sup>

As concerns UNAT, and to a great degree administrative tribunals in general, "not only did the Court firmly establish the judicial character of the Tribunal, but it considerably enhanced the authority and respectability of its judgment. This was a significant contribution to the continued existence as well as the progressive development of the

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the International Labour Organisation Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization) 77, 179-80 (Oct. 23, 1956).

85. 1956 I.C.J. at 98. The purpose of the system is "to ensure to the Organization the services of a personnel possessing the necessary qualifications of competence and integrity and effectively protected by appropriate guarantees in the matter of observance of the terms of employment and of the provisions of Staff Regulations." *Id.* Thus, it seems that the ICJ was inclined to favor the Tribunal's exercising broad control over the discretionary action of administration officers.

86. Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, 205 (July 12).

87. Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, 1987 I.C.J. 18, 63 (May 27).

88. BASAK, *supra* note 79, at 153-54.

Tribunal.”<sup>89</sup>

Most importantly, the opinion contained, in Judge de Arechaga's words, a “thinly veiled suggestion for the establishment of a system of judicial review.”<sup>90</sup> As a result, in 1955 UNAT's Statute was amended<sup>91</sup> and a special (though in many respects imperfect) system of review was set up.<sup>92</sup>

By virtue of Article 11(1) of the UNAT Statute, a Member State, the Secretary General, or a person in respect of whom a judgment has been rendered by the Tribunal may request the review<sup>93</sup> of the Tribunal's judgment on several grounds.<sup>94</sup>

The request is forwarded to the Committee on Applications for Review of Judgments of the Administrative Tribunal, which decides whether there is a substantial basis for the application and, if so, requests an advisory opinion of the ICJ.<sup>95</sup> Under Article 11(2), the Secretary General is obliged to arrange to transmit to the Court the views of the person referred to in paragraph 1. According to paragraph 3, after the opinion has been rendered, it is also the duty of the Secretary General to give effect to the opinion or request the Tribunal to convene specially in order to confirm its judgment or bring it into conformity with the opinion of the Court. The Committee, anticipated by Article 11(4) of the Statute, is a body composed of Member States, the representatives of which have served on the General Committee of the most recent regular session of the General Assembly.<sup>96</sup> Its main func-

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89. KOH, *supra* note 8, at 123.

90. 1973 I.C.J. at 243 (separate opinion of Judge de Arechaga).

91. G.A. Res. 957(X), U.N. GAOR, 10th Sess., Supp. No. 19, at 30, U.N. Doc. A/3116 (1955).

92. On the procedure, see, e.g., Jacques Dehaussy, *La procédure de réformation des jugements du Tribunal administratif des Nations Unies*, 1956 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 460 (1956). The procedure's legality and propriety were objected to from the outset. One delegation made a formal proposal that the Court be requested to give an advisory opinion in this regard. See 1973 I.C.J. at 171. See *infra* Part III for a discussion of the procedure.

93. Article 11(1) does not actually use the term “review,” but rather the expression “objects to the judgement” (of the Tribunal). However, the nature of the procedure was confirmed by the name given to the Committee provided for in Article 11: the Committee on Applications for Review of Judgments of the United Nations Administrative Tribunal. Statute of the United Nations Administrative Tribunal, Art. 11(1), adopted by Res. 351A(IV), U.N. Doc. A/1127 (1949), reprinted in STATUTES AND RULES OF PROCEDURE OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS 23 (Bruno M. de Vyest ed., 1981).

94. See *infra* discussion accompanying note 124.

95. In the event the Committee finds a “substantial basis” for review, the request is mandatory: Article 11(2) of the Statute of the United Nations Administrative Tribunal uses the word “shall.” Resort to the ICJ is not very common; prior to the 1973 advisory opinion the Committee had dealt with sixteen applications for review, all of which arose from staff members. 1973 I.C.J. at 176.

96. The requirement is not mandatory, as was demonstrated by the 1982 advisory opinion. The representative of Sierra Leone, who was unable to attend the Committee's twentieth session, had delegated the representative of Canada as his substitute, even though Canada was not a

tion is the examination of an application submitted in accordance with Article 11(1) with the object of deciding whether there is a substantial basis for resort to the ICJ.

It took nearly two decades after the 1955 amendment before an application based on Article 11 of the UNAT Statute resulted in the initiation of proceedings before the ICJ. The Court's advisory opinion of 1973 was more than a reply to the questions concerning the Tribunal's judgment; it constituted the first and most profound evaluation of the controversial review procedure and—what is relevant at this point—of the nature and place of the Committee.

Most criticism raised with regard to the Committee was directed at its authority to request advisory opinions from the ICJ. It was argued that the Committee was not an "organ" within the meaning of Article 96(2) of the U.N. Charter. Judge Gros insisted that this body

devoid as it is of permanence and of continuity in its composition, and not accumulating any experience is merely a kind of occasional panel meeting at irregular intervals, or a conference of member States, but certainly not an organ in the proper, institutional sense of the word.<sup>97</sup>

The Court rejected this argument, noting that Article 11(4) of the UNAT Statute provides for "no more than a convenient method of establishing the membership of the Committee, which was set up as a separate committee invested with its own functions distinct from those of the General Committee."<sup>98</sup> The Court drew attention to the provision allowing the Committee to establish its own rules of procedure which, in the Court's view, was a sufficient guarantee of the independence of the Committee—a prerequisite of its being considered an "organ."<sup>99</sup>

It was furthermore contended that the Committee did not have "any activities of its own," and consequently that there could be no "legal questions arising within the scope" of its activities<sup>100</sup>—another prerequisite for resorting to the ICJ according to Article 96(2) of the Charter.

However, the ICJ was content that Article 96(2) of the Charter

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member of the Committee at that time. The ICJ held that although irregular, this circumstance did not affect the validity of the Committee's request for an advisory opinion. Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 342-43 (July 20).

97. Application for the Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, 259 (July 12) (dissenting opinion of Judge Gros); see also *id.* at 298 (dissenting opinion of Judge Morozov) and *id.* at 225-26 (separate opinion of Judge Oneyama).

98. *Id.* at 173.

99. *Id.*

100. *E.g.*, 2 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 690 (1965).

and Article 11(4) of the UNAT Statute "prima facie, suffice to establish the competence of the Committee to request advisory opinions of the Court."<sup>101</sup> The Court admitted that the scope of activities of the Committee was a narrow one,<sup>102</sup> but was inclined to view them "in the larger context of the General Assembly's function in the regulation of staff relations of which they form a part."<sup>103</sup> The mere fact that the Committee's activities served a "particular, limited purpose" in the General Assembly's function in this field could not constitute a bar to its establishment. Nor did the Court find any limitation in the power of the General Assembly to authorize the Committee to request advisory opinions,<sup>104</sup> even if the latter were not in fact to be used for the purposes of the requesting organ's activities.<sup>105</sup>

When dealing with the problem of whether the General Assembly possessed the power to create an organ of such nature and functions as those of the Committee, the Court had, as in 1954, to face the tension arising from the possibility of a narrow interpretation of Articles 7 and 22 of the U.N. Charter:<sup>106</sup> If the Committee is vested with quasi-judicial functions that the General Assembly itself does not possess, on what basis could the former organ have been established? Again, the answer seems to lie in the presumption that the organ in question is created to facilitate the performance of the main organ's functions in general, without there necessarily occurring a delegation of functions.

Indeed, the Court followed a similar line as it did in 1954. It pointed out that Article 22 "specifically leaves it to the General As-

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101. 1973 I.C.J. at 173.

102. The Court listed the following functions: receiving applications which formulate objections to judgments of the Administrative Tribunal, deciding within thirty days whether there is a substantial basis for an application and, if the Committee so decides, requesting an advisory opinion from the Court. The Court stressed that the primary function of the Committee is not the requesting of advisory opinions, but examining objections to judgments or "screening." Thus, any legal questions submitted arise not out of judgments of UNAT, but out of objections to those judgments. 1973 I.C.J. at 174. There is disagreement about the classification of the Committee's functions. The Court itself has referred to them as "quasi-judicial." *Id.* at 176. Judge Lachs takes a contrary view. Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 432 (July 20) (dissenting opinion of Judge Lachs). According to Judge Ago they are "certainly judicial or at least quasi-judicial." Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, 1987 I.C.J. 18, 108 (May 27) (separate opinion of Judge Ago).

103. 1973 I.C.J. at 174.

104. *Id.*

105. *Id.* In a later passage the Court added that "there is nothing in Article 96 of the Charter or Article 65 of the Statute of the Court which requires that the replies to the questions should be designed to assist the requesting body in its own future operations or which makes it obligatory that the effect to be given to an advisory opinion should be the responsibility of the body requesting the opinion." *Id.* at 175.

106. See A.I.L. Campbell, *The Limits of Powers of International Organisations*, 32 INT'L & COMP. L.Q. 523, 526 (1983).

sembly to appreciate the need for any particular organ," the sole restriction being the necessity for performance of its functions.<sup>107</sup> The Court admitted that here there had been no instance of delegation of functions, relying once again (as it had done with regard to UNAT) on Article 101(1) of the Charter to conclude that:

it necessarily follows that the General Assembly's power to regulate staff relations also comprises the power to create an organ designed to provide machinery for initiating the review of judgments of such a tribunal.<sup>108</sup>

It seems that the Court could have emphasized more strongly the need for the creation of a review procedure, a prerequisite for the successful functioning of the staff dispute resolution system and for the protection of officials. Judge de Castro pointed out that "[t]he Committee is an organ which is supplementary to the Administrative Tribunal; it was set up to provide additional guarantees of the judicial function of the Tribunal."<sup>109</sup>

There is no doubt that the General Assembly had the power to create the Committee on Applications for Review of Judgments of the Administrative Tribunal—a follow-up body to the Administrative Tribunal itself. The power to regulate staff relations implies the power to create judicial and quasi-judicial organs for the benefit of staff members. Here "[t]he need for some screening organ designed to avoid frivolous or unjustified objections being brought before the Court cannot be denied."<sup>110</sup>

With the creation of the Committee, the U.N. system of judicial resolution of staff disputes became complete.

## II. THE INTERNATIONAL COURT OF JUSTICE AND THE PROCEDURE OF REVIEW OF JUDGMENTS OF ADMINISTRATIVE TRIBUNALS

### A. *General Remarks*

In its 1973 advisory opinion, the ICJ sanctioned the establishment of a review procedure of judgments of UNAT. It had done the same with regard to ILOAT in its 1956 advisory opinion.<sup>111</sup> In both opinions the ICJ had shown its willingness to accept the role entrusted to it

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107. Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, 172-73 (July 12).

108. *Id.* at 173.

109. *Id.* at 277 (dissenting opinion of Judge de Castro).

110. *Id.* at 244 (separate opinion of Judge de Arechaga).

111. However, it seems that in 1956 the Court took a very cautious approach: it acknowledged that the procedure was an unusual one by stressing that the Court was not bound for the future by the opinions advanced in this case. Judgments of the Administrative Tribunal of the

in the protection of staff members of international organizations having resort to those two tribunals. It did, in fact, assume the task of a court of appeals—a task without any direct legal basis in the ICJ Statute.

It must be underlined at the outset that viewing the ICJ as a court of appeals is not as unusual as it first seems. After all, many disputes are brought before the Court when all other dispute settlement methods have failed and there is hope that the Court will serve as a resort of last instance. Most of the Court's advisory proceedings were preceded by bitter legal and political controversies. One may risk the assertion that since most advisory opinions deal with some specific aspect of the activity of an international organization, they constitute in fact a form of review—an assessment, on the merits, of the organization's actions. The *Expenses* opinion<sup>112</sup> serves as an example. In that case the ICJ had to evaluate the legality and propriety of establishing peace-keeping forces, which involved the analysis of the legality of resolutions of both the General Assembly and the Security Council. In that sense, advisory opinions are often a form of "appeal" or "quasi-appeal" from decisions and other resolutions of various bodies.<sup>113</sup>

What is striking in the case of applications for review of administrative judgments is that the parties involved are, on the one hand, an international organization, and, on the other hand, an individual. This raises many problems of both doctrinal and practical significance.<sup>114</sup>

According to Article 34 of the ICJ Statute, the ICJ is an organ established to settle disputes between States, which are the primary subjects of international law, and not between any other subjects of international law. Despite pressure<sup>115</sup> to broaden the reach of the Statute to include international organizations within the jurisdiction of the Court, Article 34 has remained unchanged. International organi-

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International Labour Organisation Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77, 86 (Oct. 23).

112. Certain Expenses of the United Nations (Art. 17(2) Charter), 1962 I.C.J. 151 (July 20).

113. See KENNETH J. KEITH, *THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE* 229 (1971).

114. Opinions that this procedure "contravenes the principles of the Charter and the Statute of the Court" are not uncommon. See, e.g., 1973 I.C.J. at 296 (dissenting opinion of Judge Morozov).

115. This pressure was especially strong after the Court's 1949 advisory opinion in which the ICJ confirmed that an international organization could be a party to an international dispute, and that disputes between international organizations and States were likely. See, e.g., HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 181 n.14 (1958); GUENTER WEISSBERG, *THE INTERNATIONAL STATUS OF THE UNITED NATIONS* 189-200 (1961).

zations can resort to the Court solely in advisory proceedings. It must be added that since the ICJ (and its predecessor) have had time and practice to deal with legal questions connected with international organizations, the procedure under which the organization in question submits its views and opinions has been well elaborated.

Another problem created by the review procedure is the access of individuals to the ICJ. Even today some authors deny individuals the privilege of being subjects of international law. The ICJ Statute is based on traditional concepts and is silent in this regard.<sup>116</sup> Through the review procedure individuals have obtained an indirect capacity to appear before an international tribunal. Of course, this concerns only a special category of individuals—international civil servants of a few selected international organizations. It is of some interest to note that the Court has always been an advocate of the special position of this category of persons in international law; as long ago as in the above-cited opinion of 1949 it drew a number of far-reaching conclusions from this special position, and as recently as 1989 it confirmed the distinct character of an official of an international organization.<sup>117</sup>

The problem remains as to how to reconcile the involvement of the ICJ in a dispute between an international organization and its official with the Court's judicial character as it is traditionally perceived. Even the Judges of the ICJ have not spared the procedure profound criticism, referring to it as a "hybrid procedure,"<sup>118</sup> pointing out its incompatibility with the rules of the ICJ Statute and of the U.N. Charter,<sup>119</sup> and with the judicial tasks of the Court.<sup>120</sup>

Nevertheless, it appears that through this procedure, in a very in-

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116. This problem, however, had already arisen before the Permanent Court of International Justice in 1935 in connection with the case of the *Danzig Legislative Decrees*. The Court admitted written statements from individuals representing three minority political parties, but decided against oral hearings of the petitioners. Gross, *supra* note 7, at 16.

117. Applicability of Art. VI, Sec. 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177 (Dec. 15), *reprinted in* 29 I.L.M. 100 (1990).

118. See, e.g., Judgment of the Administrative Tribunal of the International Labour Organization Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77, 108 (Oct. 23) (separate opinion of Judge Winiarski); Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 432 (July 20) (dissenting opinion of Judge Lachs) (pointing out the "basically hybrid nature of the system). On the other hand, Judge de Castro took the view that this "hybrid procedure" and "pseudo-advisory opinion" are "a legitimate development of the law, on the lines of the techniques of Common Law or the Roman praetor, whereby existing provisions are employed for new ends." Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, 275 (July 12) (dissenting opinion of Judge de Castro).

119. See, e.g., Judge Córdova who claims that the ICJ is incompetent both *ratione personae* and *ratione materiae* in these cases, 1956 I.C.J. at 158 (dissenting opinion of Judge Córdova).

120. See, e.g., 1956 I.C.J. at 109, 112 (separate opinion of Judge Klaestad) and 1982 I.C.J. at 439 (dissenting opinion of Judge Morozov).



conspicuous way, a small revolution has taken place. It has affected, to a considerable degree, the Court's role as the judicial organ of the United Nations, as well as such issues as the position of individuals in international law and the nature of internal law of international organizations.

Some aspects of the Court's activity as an organ of appeal are outlined below. An attempt will be made to demonstrate how the ICJ has managed to find a theoretical justification for the most profound problems it has faced.

### B. *Jurisdiction of the Court*

As mentioned above, none of the basic U.N. documents provide for the possibility of review by the ICJ of judgments of administrative tribunals. As Judge Winiarski rightly remarked, the review procedure "was certainly not contemplated by the draftsmen of the Charter and of the Statute."<sup>121</sup> A proposal to that effect was put forward by Venezuela at the San Francisco Conference, but was rejected.<sup>122</sup>

The above notwithstanding, an appropriate procedure for revision of administrative tribunal judgments was provided for with respect to ILOAT and UNAT. The former's statute provides in Article XII that whenever the International Labour Organisation (ILO) Governing Body or the Administrative Board of the Pensions Fund challenges the decision of ILOAT confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental procedural fault followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body for an advisory opinion to the ICJ.<sup>123</sup> Paragraph 2 of the provision explicitly provides that the Court's opinion shall be binding.

Under Article 11 of the UNAT Statute, an advisory opinion may

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121. 1956 I.C.J. at 106 (separate opinion of Judge Winiarski).

122. The proposal provided in relevant part: "[a]s a Court of Appeal, the Court will have jurisdiction to take cognizance over such cases as are tried under original jurisdiction by international administrative tribunals dependent upon the United Nations when the appeal would be provided in the Statute of such Tribunals." Doc. WD 188, IV/1/24, 13 U.N.C.I.O. Docs. 482 (1945). Judge Córdova concludes that the failure to adopt the amendment amounted to "an advanced denial and clear rejection of all Requests for Advisory Opinions having the effect of an appeal." 1956 I.C.J. at 161 (dissenting opinion of Judge Córdova). See also Ostrihansky, *supra* note 6, at 102, 104-05. The author points out that the proposed procedure was different from that in the review UNAT and ILOAT judgments in that the former concerned the competence of the ICJ in contentious cases, and was not intended to be of an advisory nature.

123. Keith believes that "[t]his Article was doubtless accepted in this form to evade Article 34(1) of the Statute." KEITH, *supra* note 113, at 171. The Annex of the ILOAT Statute takes into account cases when the dispute involves other organizations which have accepted ILOAT's dispute resolution procedure. In those cases the Executive Boards concerned can request an advisory opinion from the ICJ. However, this may create problems. See *supra* text accompanying note 56.

be requested on any of the following grounds: that the Tribunal has exceeded its jurisdiction or competence, failed to exercise jurisdiction vested in it, erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice.<sup>124</sup>

It must be borne in mind that the procedure is provided for in resolutions of international organizations, instruments which have no binding force with regard to the ICJ.<sup>125</sup> Thus, there arises a problem of the legal basis of the Court's competence: Can the latter be broadened and, if so, on what grounds? Can it be implied from the relevant provisions of the U.N. Charter and the ICJ Statute, or does it flow from a separate legal basis?

Judge Córdova rejected any possibility of broadening the Court's jurisdiction:

the jurisdiction of the Court derives entirely and exclusively from its Statute, and no other international instrument, including the Statutes of Administrative Tribunals or the resolutions of any Organ of the United Nations, can introduce any modification with regard to the jurisdiction of the Court; they cannot, in particular, either enlarge or diminish the competence of the Court, as defined by the Statute, with regard to its two legal activities, the judicial and the advisory functions.<sup>126</sup>

However, the ICJ does not share these sentiments. The Court bases its competence on two provisions: Article 96 of the U.N. Charter and Article 65(2) of the ICJ Statute.<sup>127</sup>

The relevant provisions of the statutes of both administrative tribunals in fact constitute a limitation of the Court's jurisdiction.<sup>128</sup> The ICJ has taken care not to exceed the grounds for review. In 1956 the Court refused to deal with a question presented to it because it would have required an analysis of "the reasons given by the Tribunal for its decision on the merits of the question submitted to it,"<sup>129</sup> which was

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124. Thus, the grounds for objection with regard to UNAT are broader than with ILOAT.

125. "It is hardly necessary to comment upon the capacity or the right of the International Labour Organisation—or as far as that is concerned, of the Assembly of the United Nations—to impose upon the International Court of Justice obligations and new functions which are not provided for in its Statute or in the Charter." Judgements of the Administrative Tribunal of the International Labour Organisation Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77, 157 (Oct. 23) (dissenting opinion of Judge Córdova).

126. *Id.* at 156.

127. See, e.g., Application for Review of Judgement No. 33 of the United Nations Administrative Tribunal, 1987 I.C.J. 18, 29-30 (May 27). In 1982 the Court also invoked Article 11 of the UNAT Statute as a basis for its competence which was severely criticized by Judge Morozov. See Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 349 (July 20); *id.* at 438 (dissenting opinion of Judge Morozov).

128. Ostrihansky, *supra* note 6, at 120; see also KEITH, *supra* note 113, at 76.

129. 1956 I.C.J. at 99.

not contemplated by Article XII. The Court hinted, however, that it would have had competence to answer the question had it been put in reliance on UNESCO's general power to ask for an advisory opinion, but the fact that it had been "expressly linked with Article XII" precluded the answer, since it was "outside that Article."<sup>130</sup>

Another problem arose when the Committee on Applications submitted a request for an advisory opinion formulated in general terms, without specification of the grounds of the request. Fortunately, the Committee had voted on two grounds during its meetings preceding the request, which facilitated the Court's dilemma. The Court decided to confine its reply to those grounds.<sup>131</sup> One wonders whether the Court would have felt inclined to reject the request without this "legislative history."

### C. *Nature of the Question*

The U.N. Charter and the ICJ Statute impose a requirement that the questions presented to the Court in advisory proceedings be legal questions. In the 1956 opinion the Court asserted that

[t]he question put to the Court is a legal question. It arose within the scope of the activities of Unesco when the Executive Board had to examine the measures to be taken as a result of the four Judgments. . . . In submitting the Request for an Opinion the Executive Board was seeking a clarification of the legal aspect of a matter with which it was dealing.<sup>132</sup>

This view is symptomatic of the Court's traditional jurisprudence. The ICJ has been inclined to classify questions presented to it as "legal questions" even in cases when law and politics are intertwined to a considerable extent.

What is unusual in this procedure is that at the origin of the request is a dispute between an international organization and one of its staff members. It has been argued that this is a way to circumvent the prohibition of bringing disputes between subjects other than States before the Court.<sup>133</sup> The ICJ itself has acknowledged that the procedure is serving, "in a way, the object of an appeal" and that "[t]he special feature of this procedure is that advisory proceedings take the

130. *Id.* For a discussion of the interrelation between Articles 96 of the UN Charter and Article 65 of the ICJ Statute, on the one hand, and the specific provisions of the administrative tribunal statutes, on the other hand, see Ostrihansky, *supra* note 6, at 105-06.

131. 1982 I.C.J. at 348-50; see also *id.* at 400-01 (separate opinion of Judge Oda).

132. Judgments of the Administrative Tribunal of the International Labour Organisation Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77, 84 (Oct. 23).

133. See *id.* at 164 (dissenting opinion of Judge Córdova).

place of contentious proceedings which would not be possible under the Statute of the Court.”<sup>134</sup>

Even the following comment, however, does not influence the Court’s readiness to reply to a request:

The existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court’s opinion, does not change the advisory nature of the Court’s task, which is to answer the questions put to it with regard to a judgment.<sup>135</sup>

Gross makes a distinction with regard to the relevant provisions of the statutes of ILOAT and UNAT respectively. In the author’s opinion, Article XII of the ILOAT Statute was designed as a means of solving a conflict of competence between two organs of an international organization, that is, as a means of determining whether the Administrative Tribunal has acted *ultra vires*.<sup>136</sup> Thus, the ICJ’s role here would not amount to rejudging the issue on the merits, but would be confined to evaluating the limits of competence of the administrative tribunal. Gross places a strong emphasis on the “distinction between an appeal having for its sole object the determination of the competence of a tribunal and an appeal having for its object the determination whether a tribunal has correctly applied the law to the merits of the dispute.”<sup>137</sup> It should, however, be noted that in the case of UNAT, the additional objection found in Article 11 (that the Tribunal “has erred on a question of law relating to the provisions of the Charter of the United Nations”) would require the Court’s exercising a “judicial review, a true appellate jurisdiction.”<sup>138</sup> In view of this objection, it is difficult to agree that the ICJ’s role is limited to problems of competence between organs of international organizations. The underlying dispute is bound to have some effect on the Court’s analysis.

Another objection connected with the nature of the question, raised by Judge Gros, is that “[t]he law applicable in the present case

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134. *Id.* at 84, 85.

135. Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, 171 (July 12); *see also* 1982 I.C.J. 333; Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, 1987 I.C.J. 18, 30-31 (May 27). This is far from what Judge Córdova would have agreed with: “One cannot think of this case as being of two different natures, a contentious case before the Administrative Tribunal and not a contentious one when it comes before the Court.” 1956 I.C.J. 163 (dissenting opinion of Judge Córdova).

136. Gross, *supra* note 7, at 33; *see also* Choi, *supra* note 6, at 356-58.

137. Gross, *supra* note 7, at 34. The author classifies the 1956 case as an “intra-organizational” dispute, where “one organ of UNESCO was at variance with the Administrative Tribunal of the I.L.O. as to the question of competence.” *Id.* at 35. The problem is discussed *infra* II(4).

138. Gross, *supra* note 7, at 36; *see* DHARMA PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT 193-95 (1972).

is not international law, which is the source of the jurisdiction conferred upon the Court."<sup>139</sup> It seems, however, that Judge Gros is in error; it must be recognized that the internal law of international organizations forms part of international law. Problems concerning international servants are no less international than any others brought before the ICJ in advisory proceedings, such as the problem of procedural rules of the Security Council.<sup>140</sup> As has been mentioned, the ICJ has admitted that administrative tribunals are "international tribunals."<sup>141</sup> It is fitting that international tribunals should hear disputes about international law.

#### D. *Scope of the Court's Review*

As noted above, the grounds of review of judgments of the administrative tribunal are different in the case of ILOAT and UNAT, respectively. Although with regard to UNAT, the challenges are generally procedural in nature, "in an appropriate case, where the judgment has been challenged on the ground of an error on a question of law relating to the provisions of the Charter, the Court may . . . be called upon to review the actual substance of the decision."<sup>142</sup> As Judge Oda observed, "the Court is expected in this case to function *in substance* similarly to an appellate court vis-à-vis UNAT, to review the actual substance of the Secretary General's decision and, if necessary, to substitute its own opinion on the merits for that of UNAT."<sup>143</sup>

Even with regard to "simple" procedural questions the answer might require an insight into the substance of the decision.<sup>144</sup> This can create serious doubts from the standpoint of the provisions of the U.N. Charter and the ICJ Statute, for the borderline between the Court's advisory and contentious jurisdiction becomes dangerously blurred.

Although the Court has always maintained that its task is not to retry the case,<sup>145</sup> in practice it has exercised freedom to go beyond the

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139. 1973 I.C.J. at 257 (dissenting opinion of Judge Gros); *see also* 1956 I.C.J. at 165-66 (dissenting opinion of Judge Córdova). For a discussion of this issue, *see* Ostrihansky, *supra* note 6, at 110-12.

140. Conditions of Admission of a State to Membership in the United Nations (Charter Art. 4), 1948 I.C.J. 57 (May 28).

141. 1956 I.C.J. at 97.

142. 1973 I.C.J. at 188. This actually was the case in the 1982 advisory opinion, which is perhaps the reason why the opinion was accompanied by so many dissents, even from Judges such as Judge Lachs who had appeared critical but sympathetic to the procedure in the 1973 advisory opinion. *See also* Gross, *supra* note 7, at 16.

143. Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, 1987 I.C.J. 18, 89 (May 27) (separate opinion of Judge Oda).

144. Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 435 (July 20) (dissenting opinion of Judge Morozov).

145. 1956 I.C.J. at 98-99; 1973 I.C.J. at 187; 1982 I.C.J. at 355-56; 1987 I.C.J. at 33-34. The

express language of the decision of the administrative tribunal and of the documents submitted to it: "The Court is not confined to an examination of the grounds of decision expressly invoked by the Tribunal; it must reach its decision on grounds that it considers decisive with regard to the jurisdiction of the Tribunal."<sup>146</sup>

In its 1973 opinion the ICJ admitted that "in appreciating whether or not the Tribunal has failed to exercise relevant jurisdictional powers, the Court must have regard to the substance of the matter and not merely the form."<sup>147</sup> The Court "takes under its consideration all relevant aspects of the proceedings before the Tribunal as well as all relevant matters submitted to the Court itself by the staff member and by the Secretary General."<sup>148</sup>

The Court acts in fact as if it were a true appellate body, confined to the grounds of review, but free to take into account all external factors which might have influenced the decision of the lower judicial organ.

### E. *Binding Character of Advisory Opinions*

Advisory opinions are, as a rule, merely of a recommendatory character and have no mandatory effect. In this respect they differ from judgments which impose on the parties an obligation to comply. Despite this, it is not uncommon that some international instruments, for instance the Convention on Privileges and Immunities of the United Nations of 1946, provide that in case of a dispute and resort to the ICJ, the latter's opinion shall be binding.<sup>149</sup> A similar provision appears in Article XII(2) of the ILOAT Statute.<sup>150</sup>

The Statute of UNAT does not state explicitly that the Court's advisory opinion shall be binding on the parties to the dispute. According to Article 11(3) of the Statute, the Secretary General shall either "give effect" to the opinion or shall request the Tribunal to con-

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Court made this clear, especially with regard to ILOAT, when it explicitly stated that errors of fact or law on the part of the Tribunal cannot give rise to the review procedure. 1956 I.C.J. at 87.

146. 1956 I.C.J. at 87.

147. 1973 I.C.J. at 189-90; see also *id.* at 235 (separate opinion of Judge Dillard).

148. *Id.* at 188.

149. See PRATAP, *supra* note 138, at 147-48. The author claims that "binding" opinions are not an exception to the rule, because "the binding force is derived wholly from the agreement between the parties, or from the relevant provision of the Constitution of the requesting body or of the Statutes of the Administrative Tribunals." *Id.* at 228.

150: "The opinion given by the Court shall be binding." Statute of the International Labour Organisation Administrative Tribunal, art. 12(2), adopted by the International Labour Conference on Oct. 9, 1946, reprinted in STATUTES AND RULES OF PROCEDURE OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS 8 (Bruno M. de Vuyst ed., 1981).

vene in order to confirm its original judgment or give a new one in conformity with the opinion. Gross comments that the text, "by offering several alternatives, avoids the automaticism of Article XII, at least in a formal sense."<sup>151</sup> The ultimate effect is, however, such that an advisory opinion of the Court is binding on UNAT.

Although the Court has admitted that this effect goes "beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion,"<sup>152</sup> it has found the relevant provision of the ILOAT Statute to be "nothing but a rule of conduct for the Executive Board, a rule determining the action to be taken by it on the opinion of the Court."<sup>153</sup> Two considerations influenced the Court's conclusion. First, the provision could in no way affect the way in which the Court functioned; that continued to be determined by the Court's Statute and Rules. Second, the provision did not affect the reasoning by which the Court formed its opinion, or the content of the opinion itself.<sup>154</sup>

In its 1973 opinion the ICJ confirmed that the specific effect of an advisory opinion cannot by itself constitute a sufficient reason for a refusal to reply to a request.<sup>155</sup>

#### F. *Initiation of Review Proceedings*

While several issues connected with the initiation of review proceedings have been briefly mentioned above when discussing the Committee on Applications of Review, other problems remain.

Under the ILOAT Statute, the request may be submitted to the ICJ either by the Governing Body of ILO or by the Executive Board of an international organization that has acceded to the ILOAT Statute. The Statute allows a basically unlimited accession of other organizations, open even to those unauthorized pursuant to Article 96(2) of the U.N. Charter to request advisory opinions. Should the problem arise, it is not clear how a request for an advisory opinion could be made in cases involving those organizations. Pratap suggests the pos-

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151. Gross, *supra* note 7, at 32. The author adds that the text, "far from weakening the appellate character of the function of the Court, on the contrary strengthens it." *Id.* at 36.

152. Judgments of the Administrative Tribunal of the International Labour Organisation Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77, 84 (Oct. 23).

153. *Id.*

154. *Id.* According to Judge Winiarski, the binding character attributed to the opinion "does not in itself affect the competence of the Court but constitutes further proof that what is involved is an appeal in the form of a Request for an Advisory Opinion." *Id.* at 107, (separate opinion of Judge Winiarski).

155. Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, 182-83 (July 12).

sibility of complying with Article 96(2) through the intermediary of the ILO.<sup>156</sup>

Another difficulty, pointed out by Pratap, is connected with the division of powers *within* a specialized agency. For example, the Relationship Agreement between the specialized agency and the United Nations (required under Article 63 of the U.N. Charter) may authorize a different organ than that specified in the agency's constitution to request advisory opinions. Such was the case with UNESCO, under whose statute only the General Conference had this power. Therefore, the Constitution had to be amended before the Executive Board could request the 1956 advisory opinion.<sup>157</sup>

As for UNAT, two organizations, the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO), have accepted its Statute. However, it is not clear whether Article 11 of the UNAT Statute could apply to proceedings involving those two organizations (the Statute is silent about organizations other than the United Nations). Nevertheless, it seems that ICAO and IMO should have access to the ICJ, be it pursuant to their general authorization to request advisory opinions or according to the statutory procedure: "both organizations are empowered to request opinions on legal questions arising within the scope of their activities, and disputes with their staff are undoubtedly within that scope."<sup>158</sup>

The UNAT system of review was also criticized because it introduced a political organ, the Committee on Applications for Review, into an essentially judicial process. Judge Gros asserted that "one cannot have a political committee, discretionary and secretive in operation, set up a hurdle, and at the same time claim to have provided 'machinery' for initiating a procedure of judicial review."<sup>159</sup> The ICJ replied that there was "no necessary incompatibility" between the exercise of the screening functions by a political body and the requirements of a judicial process, "inasmuch as these functions merely furnish a potential link between two procedures which are clearly judicial in nature."<sup>160</sup>

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156. PRATAP, *supra* note 138, at 75. Keith believes that the basis of the Court's jurisdiction in those cases could follow from Article 36, para. 1, of the ICJ Statute. KEITH, *supra* note 113, at 41-44. Ostrihansky takes the stand that any attempt to request an advisory opinion by those organizations should be rejected by the Court. Ostrihansky, *supra* note 6, at 107-08.

157. See PRATAP, *supra* note 138, at 75-76.

158. Ostrihansky, *supra* note 6, at 107.

159. 1973 I.C.J. at 263 (dissenting opinion of Judge Gros).

160. *Id.* at 176. Ostrihansky notes that an intermediate body is necessary for enabling staff members to have recourse to the Court. The author admits, however, that a procedure involving a separate review organ would be more desirable. Ostrihansky, *supra* note 6, at 118.



Moreover, as Judge de Castro has noted, other bodies of an "undoubtedly political character" (the General Assembly and the Security Council) have the right to request opinions, and this is not considered an obstacle from the point of view of the requirements of judicial process.<sup>161</sup>

In general, the Court is willing to accept any request coming from an organ of the United Nations duly authorized under Article 96(2) of the U.N. Charter.<sup>162</sup> The ICJ is ready to ignore any legal or political controversies concerning that organ, as long as this basic condition is satisfied.

Another imperfection, problematic with regard to the "requirements of the judicial process," can be traced in the UNAT review procedure. Under Article 11 of the UNAT Statute, an individual Member State, not party to the proceedings, may object to a judgment of UNAT. It was argued that this would not only impinge on the rights of the Secretary General and conflict with Article 100 of the U.N. Charter,<sup>163</sup> but would also place the staff member in a position of inequality before the Committee, especially if the Member State is a member of the Committee at the time of the application.<sup>164</sup>

In 1973 the ICJ seemed to indicate that this indeed would create a troublesome situation. Although the Court at that time dismissed the issue as being "without relevance to the present proceedings,"<sup>165</sup> it reserved the right to deal with it should there be an application of a Member State in the future.

It so happened that the next application, which led to the 1982 advisory opinion, was made by the United States, a Member State also a member of the Committee. Despite its prior declaration, the ICJ only reiterated its previous position that the procedure in general was compatible with the U.N. Charter, the ICJ Statute, and the requirements of the judicial process, adding that this assessment did not depend on whether the request for an advisory opinion had resulted from the action of a staff member, a Member State, or the Committee it-

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161. 1973 I.C.J. at 278 (separate opinion of Judge de Castro).

162. *Id.* at 175.

163. One contention is that the procedure enables every Member State to force the Secretary General to delay the implementation of the Tribunal's judgments, this being incompatible with his status as the "chief administrative officer of the Organization" and with the "exclusively international character" of his responsibilities. The ICJ has rejected these arguments, underlining that the Secretary General is only obliged to *suspend* the implementation of the judgment until it is confirmed or modified. This is a normal consequence of a review procedure. Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 337-38 (July 20).

164. *Id.* at 374-75 (separate opinion of Judge Ruda).

165. 1973 I.C.J. at 178. The application for review had come from a staff member.

self.<sup>166</sup> What was important for the Court was that the request had emanated from the Committee; the origin of the application was irrelevant.<sup>167</sup>

### G. *Participation of Individuals in the Proceedings*

The above subheading is to some extent misleading because according to the letter of law, there can be no participation of individuals in proceedings before the ICJ. However, it must not be ignored that in cases concerning review of judgments of administrative tribunals, individuals are involved *de facto*. The issue already became relevant, indirectly, in connection with the 1954 advisory opinion, but in that case the ex-officials were not parties to the dispute.<sup>168</sup>

The Court is faced here with a dilemma. On the one hand, there is a need to assure equality of the parties. According to Article 35(2) of the ICJ Statute, this is one of the fundamental principles of the ICJ system which "follows from the requirements of good administration of justice."<sup>169</sup> On the other hand, the ICJ Statute precludes participation of individuals before the Court. The problem then arises of how to ensure the Court's access to all relevant documents and views, including those of the officials involved.<sup>170</sup> As the ICJ has noted, "the judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court."<sup>171</sup>

As far as equality of the parties is concerned, one aspect of the problem has already been mentioned in connection with the right of a Member State to initiate proceedings before the Committee on Applications for Review. The problem, however, is not confined to the rela-

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166. 1982 I.C.J. at 333. The Court acknowledged that Member States "may well have a legal interest in giving rise to a review of the Judgment." *Id.* at 335. Ostrihansky suggests that "[t]he right of a member-State to introduce an application for review to the Committee should be derived from the functional character of the international legal personality of the Organization. Being a subject of international law, an organization does not cease to be a forum articulating the interests of the member-States." Ostrihansky, *supra* note 6, at 120.

167. 1982 I.C.J. at 335.

168. See KEITH, *supra* note 113, at 168.

169. Judgments of the Administrative Tribunal of the International Labour Organisation Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77, 86 (Oct. 23).

170. Under Article 66 of the ICJ Statute, only States and international organizations are entitled to submit statements to the Court. Pratap remarks that where a request for an opinion may directly concern the rights of individuals, the Court must, in order to do justice effectively, provide them with the opportunity to submit their views. A different approach would constitute a violation of the principle of *audiatur et altera pars*. PRATAP, *supra* note 138, at 188-89; see also Brownlie, *supra* note 7, at 719; Choi, *supra* note 6, at 349-50.

171. 1956 I.C.J. at 86.

tionship between an official and a State; above all, the staff member is placed in a position of inequality with regard to the other party to the dispute, the international organization.

The procedure is flawed by inequality at the outset in the cases of the ILOAT and the ILO: only the international organization, through its Executive Board in the case of the ILOAT or Governing Body in the case of the ILO, has the right to submit a request for a binding advisory opinion of the ICJ. Naturally, this is a serious disadvantage for the staff member. It is hard to imagine that the organization, having been successful in proceedings before ILOAT, will be willing to refer the case to the ICJ. In fact, in the only previous case so brought before the Court, ILOAT had ruled in favor of four applicants whose contracts had not been renewed by the Director General of UNESCO.

In view of the above, it was contended that the Court was not competent to reply to the 1956 request due to the lack of equality of the parties and the fact that the "only means of securing equality" would be to change the ICJ Statute.<sup>172</sup>

The Court dismissed the objection on two principal grounds. First, the inequality was not an inequality before the Court, but was "antecedent to the examination of the question by the Court."<sup>173</sup> Second, it did not affect the manner in which the ICJ undertook that examination.<sup>174</sup> The Court asserted that judicial protection of officials was its primary goal and that "[a]ny seeming or nominal absence of equality ought not to be allowed to obscure or to defeat that primary object."<sup>175</sup>

Moreover, one can argue that the mere fact of acceptance of the request strengthens the principle of equality of the parties—especially in cases where the decision of the administrative tribunal is unfavorable to the staff member.

The absence of equality can, in the Court's opinion, be remedied by the imposition of two requirements. The first is to ensure that the officials can submit their views to the Court. The second is dispensing with oral proceedings.<sup>176</sup>

A precedent for the first condition was set up in the 1956 advisory

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172. *Id.* at 168 (dissenting opinion of Judge Córdova).

173. *Id.* at 85. The Court believed that the inequality was only "nominal" because the officials had been successful in the proceedings before ILOAT. *Id.* Judge Winiarski did not think that the inequality constituted a "ban" to the rendering of the opinion, although it "added to" a situation not compatible with the Court's judicial character. *Id.* at 108 (separate opinion of Judge Winiarski).

174. *Id.* at 85.

175. *Id.* at 86.

176. *Id.*

opinion when the views of the officials were transmitted through the intermediary of UNESCO. Of course, this procedure makes the individuals concerned wholly dependent on the organization—their opponent in the proceedings.<sup>177</sup>

In this regard, the procedural position of individuals is “more secure”<sup>178</sup> in the case of UNAT than in the case of ILOAT. Under the UNAT Statute the staff member is entitled not only to initiate proceedings which may lead to a request for an advisory opinion, but also to have his views submitted to the Court by the Secretary General without any control of the latter. This, however, does not by itself solve the problem of equality of the parties before the ICJ.

Dispensing with oral proceedings also has its drawbacks.<sup>179</sup> One can imagine that a State or an organization could submit at any time a request for an oral hearing on the basis of Article 66(2) of the ICJ Statute. This, as Judge Khan noted, would be tantamount to a veto on the Court’s right to reply.<sup>180</sup> It places the Court in an uncomfortable position of being dependent on a State’s or international organization’s willingness to cooperate.<sup>181</sup>

Moreover, the Court itself might find it necessary to hold oral hearings in order to clarify the views of the parties:

In such cases not to admit staff members to participate in cases involving not merely questions of jurisdiction or fundamental errors in procedure but also errors on questions of law relating to the provisions of the Charter, might well present the Court with the dilemma of refusing the opinion or of transgressing the principle of equality of the parties.<sup>182</sup>

However, the Court does not seem concerned with the risks involved. It considers the holding of public hearings “a matter within the discretion of the Court,” finding no special reasons for the interested parties to have an opportunity to submit oral statements as long as other possibilities of presenting their views are at their disposal.<sup>183</sup> The Court is

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177. *Id.* at 110 (separate opinion of Judge Klaestad).

178. Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, 180 (July 12). Gross refers to it as “equality to a greater extent” although he notes that the procedure still leaves something to be desired. Gross, *supra* note 7, at 30.

179. Oral proceedings have been referred to as “a normal and useful, if not an indispensable, part” of the Court’s proceedings. 1956 I.C.J. at 110 (separate opinion of Judge Klaestad). Judge Gros considers oral statements “an indispensable condition for any proper investigation of the case.” 1973 I.C.J. at 265 (dissenting opinion of Judge Gros).

180. 1956 I.C.J. at 114-15 (separate opinion of Judge Khan).

181. It is worth noting that the resolution adopting Article 11 of the UNAT Statute recommended that Member States and the Secretary General refrain from making oral statements in any proceedings under that Article. See 1973 I.C.J. at 180-81.

182. PRATAP, *supra* note 138, at 193.

183. 1973 I.C.J. at 181.

only concerned to ensure that the interested parties shall have a fair and equal opportunity to present their views to the Court respecting the questions on which its opinion is requested and that the Court shall have adequate information to enable it to administer justice in giving its opinion.<sup>184</sup>

Thus it seems that as long as the Court is satisfied that each side has been given a *de facto* equal opportunity to make submissions, any technical or legal inequality is not decisive.<sup>185</sup>

#### H. *Propriety of the Court's Reply*

In view of all the above, even if the Court's competence is affirmed, one may wonder whether the ICJ should reply to these types of requests. There is no obligation on the part of the Court to do so; Article 65 of the ICJ Statute gives the Court discretion in that regard. However, so far the ICJ has not resorted to this possibility, despite allegations that the effect of the procedure is to "render—in the guise of an advisory opinion or advice—a true judgment, a real decision binding those parties."<sup>186</sup>

The Court has remained faithful to the principle that only "compelling reasons" could preclude it from replying to a request for an advisory opinion.<sup>187</sup> Its attitude has been characterized as that of a "duty to reply."<sup>188</sup> The Court has emphasized that it could not refuse to "lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized to ask for an Advisory Opinion of the Court,"<sup>189</sup> or of the United Nations itself.

The "duty to reply" is strengthened by the "primary object" of the established system of review which is the judicial protection of officials.<sup>190</sup> It appears that the ICJ, being the primary judicial organ of the United Nations, views its role as that of a guardian of the effective functioning of the whole system.

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184. *Id.* at 182.

185. KEITH, *supra* note 113, at 176.

186. Judgments of the Administrative Tribunal of the International Labour Organisation Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77, 161 (Oct. 23) (dissenting opinion of Judge Córdova); *see also* Gross, *supra* note 7, at 25-26.

187. *See* 1956 I.C.J. at 86; 1973 I.C.J. at 183; Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 347 (July 20). In the latest opinion the Court stated: "It is . . . well established that the reply of the Court to a request for opinion represents its participation in the activities of the United Nations and, in principle, should not be refused." Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, 1987 I.C.J. 18, 31 (May 27).

188. KEITH, *supra* note 113, at 176.

189. 1956 I.C.J. at 86.

190. *Id.*

Of course, doubts remain as to the propriety of the Court's assuming this role. In Judge Gros's opinion, the Court should apply "two essential principles for the examination of its own jurisdiction in each review case that might be submitted to it." The first, and in his view "hierarchically" superior principle, is the prohibition of "any encroachment on 'the requirements of good administration of justice'," and the second principle is that only compelling reasons may cause the Court to refuse "its collaboration in the working of a régime for the judicial protection of officials."<sup>191</sup>

An analysis of the Court's jurisprudence shows that the second consideration is more important. Not even serious procedural inconsistencies are sufficiently "compelling" to make the Court exercise its discretion.<sup>192</sup>

The Court is aware of the irregularities arising in the review procedures. As the Court later described in its 1973 opinion, it had

a duty to ascertain whether the procedure in which it was called upon to play an essential part was truly compatible with its task, its functions and the ways they are to be discharged. That meant that it had to satisfy itself that this system enabling Administrative Tribunal judgements to be reviewed by the indirect means of an advisory opinion was compatible with the provisions of the United Nations Charter and the Statute of the Court, and with the requirements of the judicial process.<sup>193</sup>

The Court also confirmed that, in general, the procedure is compatible with the two basic instruments and the requirements of the judicial process.<sup>194</sup> As concerns the latter, the ICJ has stated that "the compatibility or otherwise of any given system of review with the requirements of the judicial process depends on the circumstances and conditions of each particular system."<sup>195</sup> In the case of both ILOAT and UNAT, the ICJ found that the "circumstances and conditions" of the established systems made the procedures satisfy the necessary conditions.

The Court has other arguments, based on grounds of general policy, in favor of complying with requests brought in the course of the review proceedings. One set of arguments is directed at the necessity to ensure adequate protection for staff members through guarding the effective functioning of the system of judicial review:

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191. 1973 I.C.J. at 255 (dissenting opinion of Judge Gros).

192. For an example of a procedural irregularity the Court deems not compelling enough to refuse its review, see discussion *supra* note 96.

193. Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, 1982 I.C.J. 325, 333 (July 20).

194. See, e.g., 1973 I.C.J. at 177.

195. *Id.* at 176.

A refusal by the Court to play its role in the system of judicial review set up by the General Assembly would only have the consequence that this system would not operate precisely in those cases in which the Committee has found that there is a substantial basis for the objections which have been raised against a judgment.<sup>196</sup>

Other arguments revolve around the Court's task to "assist" the United Nations and the need of "participation in the activities" of the Organization.<sup>197</sup>

The following passage from the 1982 advisory opinion reflects the Court's policy:

The stability and efficiency of the international organizations, of which the United Nations is the supreme example, are however of such paramount importance to world order, that the Court should not fail to assist a subsidiary body of the United Nations General Assembly in putting its operation upon a firm and secure foundation. While it would have been a compelling reason, making it inappropriate for the Court to entertain a request, that its judicial role would be endangered or discredited, that is not so in the present case, and the Court thus does not find that considerations of judicial restraint should prevent it from rendering the advisory opinion requested.<sup>198</sup>

### CONCLUSION

The closing comments of this article necessarily concern the future of the systems of review of UNAT and ILOAT judgments. It has been repeated often—and the above remarks certainly underline—that the review procedure is far from satisfactory. As the Court has put it diplomatically, it is not "free from difficulty."<sup>199</sup> Suggestions for the future go in two directions.

First, a uniformization of the two procedures is proposed. This would eliminate the different and institutionally dependent position of officials who work for the United Nations or the International Labour Organisation, and would implement more fully the principle of equal protection of all members of the international civil service.<sup>200</sup> Furthermore, harmonization of the procedures would facilitate the Court's task in exercising the functions of an appellate tribunal. Sug-

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196. *Id.* at 177.

197. Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, 1987 I.C.J. 18, 31 (May 27).

198. 1982 I.C.J. at 347.

199. 1973 I.C.J. at 183.

200. 1982 I.C.J. at 433 (dissenting opinion of Judge Lachs). Judge Lachs has from the outset been an advocate of improvement and unification of the two separate procedures. See 1973 I.C.J. at 214 (declaration of Judge Lachs); Manfred Lachs, *Some Reflections on the Contribution of the International Court of Justice to the Development of International Law*, 10 SYRACUSE J. INT'L L. & COM. 239, 276-77 (1983).

gestions of harmonization include a proposal to fuse the two tribunals into one,<sup>201</sup> which doubtlessly would contribute to the strengthening of the system of judicial protection of officials.

Second, the above changes notwithstanding, a revision of the role of the ICJ is necessary. Legal certainty requires that if the Court is to exercise review functions in the future, this should be reflected in the ICJ Statute. The time has probably come to reconsider the Venezuelan proposal from the San Francisco Conference. The idea of setting up a separate chamber of the ICJ<sup>202</sup> to exercise appellate functions merits support. Also, statutory regulation of the position of individuals in proceedings before the ICJ is necessary.

If the Court's role as an appellate body is maintained, efforts should be made to broaden its jurisdiction to cases arising before administrative tribunals outside the United Nations system. *Broadbent v. OAS* clearly demonstrated the need for some kind of review procedure in the case of the Administrative Tribunal of the OAS.

The implementation of the above proposals would enhance the Court's position as a true "World Court."

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201. See, e.g., 1987 I.C.J. at 74-75 (separate opinion of Judge Lachs); *id.* at 76 (separate opinion of Judge Elias); *id.* at 108-09 (separate opinion of Judge Ago); see also Paul Tavernier, *La fusion des Tribunaux Administratifs des Nations Unies et de l'O.I.T.: nécessité ou utopie?*, 25 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 442 (1979).

202. In 1958 Gross had already suggested the establishment of a lower quorum or a special chamber of five judges to handle such disputes. Gross, *supra* note 7, at 40; see also Ostrihansky, *supra* note 6, at 121; Rudolf Ostrihansky, *Chambers of the International Court of Justice*, 37 INT'L & COMP. L.Q. 30 (1988).